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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1946.

No. 986

JOSEPH E. SEAGRAM & SONS, INC.,
Petitioner.

vs.

ISADORE LEVIN,
Respondent.

PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SUPPORTING BRIEF.

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INDEX

PAGE

Petition for Certiorari to the Circuit Court of Appeals for the Seventh Circuit and Supporting Brief 1

Summary and Short Statement of the Matter Involved 1

Statement of Facts 2

Jurisdictional Statement 5

Questions Presented 6

Reasons Relied on for Allowance of the Writ 6

Brief in Support of Petition 8

Assignment of Errors 8

Propositions of Law Relied On 9

Summary of Argument 12

Argument 13

Table of Cases Cited.

C. & E. I. R. R. Co. v. Burridge, 211 Ill. 9 ..... 10, 19

Dallas Railway v. Sullivan, 198 Fed. (2) 581, (C. C. A. 5) 9, 13

Denver City Tramway Company v. Norton, 141 F. 599 (C. C. A. 8) 11, 12, 19

Erie Railroad Company v. Cox, 145 U. S. 593 ..... 10, 19

John L. Roper Lumber Co. v. U. S. 150 Fed. (2) 329 ..... 11, 19

Korn v. Chicago Railway Co., 271 Ill. 329 ..... 10, 19

Mississippi Publishing Corporation v. Murphree, 326 U. S. 438, 90 Law Ed. 207 ..... 9, 17

Swett v. Givner, 5 Fed. Supp. 739, 740 ..... 11, 19

Terminal R. Ass'n of St. Louis v. Staengel, 122 Fed. (2) 271 (C. C. A. Mo.) 9, 13

Texas & Pacific Railway Co. v. Cox, 145 U. S. 593, 605 ..... 11, 19

West Chicago City Railroad Co. v. Dougherty, 170 Ill. 379 ..... 10, 19

STATUTES.

28 U. S. C. A., Sec. 725 11

Federal Rules of Civil Procedure, Rule 51 ..... 9, 12, 13

TEXTS.

Cyclopedia of Federal Procedure, 2nd Ed. Vol. 7 Sec. 3394, page 67 ..... 10, 17

Dobie, Federal Rules of Civil Procedure, 25 Virginia Law Review, 261, 290 ..... 10, 17

Hughes, Federal Practice and Procedure, Vol. 18, page 338, Sec. 24473 ..... 9, 13

Report of Federal Rules and Civil Procedure and Proceedings of the American Bar Institute, 1938, page 316 ..... 10, 17

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PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SUPPORTING BRIEF.

May It Please The Court:

Joseph E. Seagram & Sons, Inc., a corporation, respectfully shows:

I.

Summary and Short Statement of the Matter Involved.

This is a personal injury case arising out of injuries received by the respondent when he was run over on North Avenue, in the City of Chicago by the right rear wheel of a truck belonging to the petitioner.

Suit was brought in the District Court of the United States for the Northern District of Illinois, Eastern Division, and tried before a jury wherein a verdict was returned finding the defendant guilty and assessing the plaintiff's damages at the sum of $22,000.00. Judgment was entered upon the verdict and an appeal was taken to the United States Circuit Court of Appeals for the Seventh Circuit. The judgment of the District Court was affirmed by the Circuit Court of Appeals. A petition for rehearing was denied.

Petitioner contends that the Circuit Court of Appeals erroneously interpreted and applied Rule 51 of the Federal Rules of Civil Procedure in the trial of this cause, which if allowed to stand, will result in a gross miscarriage of justice. Furthermore, inasmuch as there was a vicious conflict between the testimony of petitioner's witnesses and the testimony of the plaintiff, in regard to material facts, it is contended that the Circuit Court of Appeals erred in holding that the defendant was not entitled to an instruction concerning the weight of the plaintiff's testimony in connection with his interest in the result of the suit. The holding of the Circuit Court of Appeals on this point is in direct conflict with the decisions of other Circuit Courts of Appeal and contrary to local (Illinois) law.

Statement of Facts.

The occurrence out of which this action arose took place on North Avenue in the City of Chicago on October 25, 1944. A Tractor trailer unit belonging to this petitioner was parked facing east on North Avenue, waiting to make a delivery to a customer located on the north side of North Avenue (Tr. 137). It was necessary for the driver, in order to make deliveries to this customer,

to back his vehicle into a small enclosed driveway which ran diagonally to the northeast from the north curbing of North Avenue (Tr. 206, 209, 213). While the driver of the truck was waiting for a pickup truck to clear this driveway, the respondent, a junk man, passed the truck with his horse and wagon, traveling east on North Avenue. As he passed the truck, several bundles of papers with which his wagon was loaded, fell into the street (Tr. 116, 139).

A police officer standing by the truck waiting to direct traffic when the truck started its backward movement into the driveway, called to the respondent, who thereupon stopped his wagon in front of the left front wheel of the tractor of the tractor trailer unit (Tr. 119, 139). The respondent dismounted from his wagon, came back, and started picking up the bundles of papers which had fallen into the street. The officer told the respondent that he would help him throw the bundles over to the side. The bundles were then placed near some cars parked at the south curbing. In doing this, one of the bundles broke and the papers were scattered about a streetcar line in the street (Tr. 120, 139). The officer then told the respondent to pull his wagon up further, as the tractor trailer unit was going to back into the driveway (Tr. 120, 139). The respondent mounted his wagon and drove to a point east of an alley, opening on North Avenue from the south (Tr. 139). The driver of the tractor trailer unit drove about 50 feet east on North Avenue, stopped, and commenced backing toward the driveway. In order to back into this driveway, it was necessary for the driver to make a jack-knife operation (Tr. 122, 142). As the truck started to back up, the police officer walked west in the street to stop traffic coming from the west (Tr. 116). Before the driver

started to back up, another driver for the petitioner and an employee of the customers to whom the delivery was being made, came into the street to assist in the backing operation. Before starting the backing operation, the driver looked in the rear view mirror and saw that everything behind him was clear. At the same time, he received a hand signal from the police officer and from the two other men to back up (Tr. 140).

Just before the driver started to back into the driveway, he saw the respondent standing by his wagon east of the alley. This was the last the driver saw of the respondent until after the accident (Tr. 141, 149). In backing up, the driver held the left door of the cab open with his left hand and looked backward along the left side of the equipment to see where he was going (Tr. 141). He was traveling at a speed of about one mile an hour (Tr. 128).

After the truck started to back, a witness testified that the respondent walked from the south sidewalk or curbing into the street and began to "meander" around the bundles of papers and loose papers that were lying in the street (Tr. 36). This operation being at a point in midblock, there was no pedestrian crosswalk (Tr. 60). The respondent stooped down to pick up some papers with his back toward the truck (Tr. 20). As he stooped over or was arising, some portion of the front edge of the trailer or the rear corner of the tractor struck him and knocked him down. The right rear wheels of the tractor ran over his legs (Tr. 117). The police officer blew his whistle and stopped the backward movement of the tractor trailer unit (Tr. 118, 143). The officer then pulled the respondent from under the tractor, called a police station for an ambulance and the respondent was taken to a hospital (Tr. 118).

The respondent received treatment at a hospital for about four weeks, at the end of which time his physician found it necessary to amputate his left leg below the knee. The right leg was fractured in two places (Tr. 71, 73).

Upon appeal from the judgment entered on the verdict of the jury in the trial court, this petitioner assigned numerous errors amongst which was the interpretation and application of Rule 51 of the Federal Rules of Civil Procedure as applied by the trial court, as well as the ruling of the trial court on an instruction submitted by this petitioner and refused by the trial court.

This petitioner has contended throughout that the interpretation and application given Rule 51 of the Federal Rules of Civil Procedure, by the trial court and by the Circuit Court of Appeals, has been extremely prejudicial and violative of the plain language, spirit and purpose of the Rule. Furthermore, inasmuch as there was a serious conflict between the testimony of the plaintiff and the testimony of witnesses for the defendant as to the position of the plaintiff and the warning he had as to the movement of the truck prior to and at the time of the accident, petitioner has insisted that the defendant was entitled to an instruction on the weight of the plaintiff's testimony. The trial court refused this instruction. The Circuit Court of Appeals in affirming this ruling of the trial court, has rendered a decision in conflict with decisions of other Circuit Courts of Appeals as well as local (Illinois) law on this point.

Jurisdictional Statement.

Jurisdiction is based upon Section 240 (a) of the Judicial Code as amended (Section 347 (a) United States Code Annotated.) The date of the decision sought to be

reviewed is November 23, 1946; rehearing denied December 19, 1946.

The opinion of the Circuit Court of Appeals appears at pages 254-260 of this record. It is also reported at 158 Fed. (2) 55.

Questions Presented.

1. Under Rule 51 of the Federal Rules of Civil Procedure, may a trial court refuse to inform counsel of its proposed action on requested instructions prior to argument?

2. Is it necessary, in order to preserve an objection under Rule 51 of the Federal Rules of Civil Procedure, for counsel to refuse to proceed with the trial when the trial judge refuses to advise counsel of his proposed action on requested instructions?

3. In view of the language of Rule 51 of the Federal Rules of Civil Procedure, is counsel required to state in the presence and hearing of the jury that he has objections to the court's charge to the jury?

4. Where there exists a severe conflict between the testimony of the plaintiff and witnesses for the defendant on material facts, is the court justified in refusing an instruction that the jury in weighing the plaintiff's testimony may take into consideration the fact that he is interested in the result of the suit?

Reasons Relied On For Allowance of the Writ.

1. The Circuit Court of Appeals has misinterpreted and incorrectly applied Rule 51 of the Federal Rules of Civil Procedure.

2. The Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter.

3. The Circuit Court of Appeals has decided an important question of local (Illinois) law, in conflict with applicable local (Illinois) decisions.

Wherefore, petitioner prays that a writ of *certiorari* be issued, directed to the Circuit Court of Appeals for the Seventh Circuit, commmanding that court to certify to and send to this court for its review and determination upon a day certain a full and complete transcript of the record and all proceedings upon the appeal to the said Circuit Court of Appeals from the judgment issued by the District Court for the Northern District of Illinois, Eastern Division, on the 17th day of January, 1946, in the case of *Isadore Levin* v. *Joseph E. Seagram & Sons, Inc.*, a corporation, Cause No. 9099, and that the judgment of the said Circuit Court of Appeals for the Seventh Circuit upon said appeal may be reviewed by this Honorable Court, and that petitioner may have such other and further relief as proper.

Joseph E. Seagram & Sons, Inc.,
a corporation,
Petitioner.

Edward R. Adams,
Leslie H. Vogel,
Counsel for said Petitioner.

Forrest S. Blunk,
Miller, Gorham, Wescott & Adams,
Vogel & Bunge,
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

Assignment of Errors.

The Circuit Court of Appeals erred in holding:

1. That the trial court did not err in refusing to inform counsel for defendant of its proposed action upon requested instructions prior to arguments to the jury as provided for under Rule 51 of Federal Rules of Civil Procedure.

2. That no error was committed under Rule 51 of the Federal Rules of Civil Procedure by the trial court in requiring counsel for defendant to state in the presence and hearing of the jury that he had objections to the charge.

3. That the District Court was correct in refusing this petitioner's request to instruct the jury that in weighing the testimony of the plaintiff they could take into consideration the fact that he was interested in the result of the suit.

4. That no conflict existed in the evidence, and that, therefore, the case of *Korn* v. *Chicago Railway Company*, 271 Ill. 329, 111 N. E. 85, was controlling.

PROPOSITIONS OF LAW RELIED ON.

I.

The clear purpose of Rule 51 of the Federal Rules of Civil Procedure is to afford Counsel an opportunity to know in advance of Arguments what the charge to the Jury will be and to provide Counsel an opportunity to make his Objections to the charge out of the hearing of the Jury.

(a) The Circuit Court of Appeals erred in holding that counsel for defendant did not sufficiently preserve an objection to the refusal of the trial judge to inform counsel of the court's rulings on the proposed instructions to the jury, when counsel did everything except refuse to proceed with the trial.

Dallas Railway v. *Sullivan,* 198 Fed. (2) 581 (C.C.A. 5)

Hughes on Fed. Practice and Procedure, Vol. 18, page 338, Sec. 24473

Terminal R. Ass'n of St. Louis v. *Staengel,* 122 Fed. (2) 271 (C.C.A. Mo.).

(b) Under Rule 51 of the Federal Rules of Civil Procedure, it was error for the trial court to require counsel for the defendant to state in the presence and hearing of the jury that he objected to the charge of the court to the jury.

Rules of Civil Procedure for District Courts, Rule 51

Mississippi Publishing Corporation v. *Murphree,* 326, U. S. 438, 444, 90 Law Ed. 207.

Report of Federal Rules and Civil Procedure and Proceedings of the American Bar Institute, 1938, page 316

Cyclopedia of Federal Procedure, 2d Ed. Vol. 7, Sec. 3394, page 67

Dobie, Federal Rules of Civil Procedure, 25 Virginia Law Review, 261, 290.

II.

Inasmuch as a serious conflict existed between the testimony of the Plaintiff and eye witnesses for the Defendant, the Defendant was entitled to an Instruction that the Jury in weighing the Plaintiff's testimony could take into consideration the fact that he was interested in the result of the Suit.

(a) Under the law of Illinois, the refusal to give an instruction on the weight of the plaintiff's testimony in a case where serious conflict exists between the plaintiff's testimony and the testimony of the defendant's witnesses is reversible error.

West Chicago City Railroad Company v. *Dougherty,* 170 Ill. 379

C. & E. I. R. R. Co. v. *Burridge,* 211 Ill. 9

Korn v. *Chicago Railway Company,* 271 Ill. 329; 111 N. E. 85.

(b) The Circuit Court of Appeals must apply the law of the State of Illinois whether statutory or announced by its courts.

Erie Railroad Company v. *Tompkins,* 304 U. S. 64, 78

Texas & Pacific Railway Company v. *Cox,* 145 U. S. 593, 605

Swett v. *Givner,* 5 Fed. Supp. 739, 740

28 U. S. C. A. Sec. 725

Denver City Tramway Company v. *Norton,* 141 Fed. 599 (C.C.A. 8)

John L. Roper Lumber Company v. *U. S.,* 150 Fed. 2d 329.

SUMMARY OF ARGUMENT.

Point I.

The opinion of the Circuit Court of Appeals in affirming the interpretation and application by the trial court of Rule 51 of the Federal Rules of Civil Procedure is contrary to the purpose, meaning and plain language of the Rule.

Point II.

The holding of the Circuit Court of Appeals that the defendant was not entitled to an instruction on the weight of the plaintiff's estimony is based on an erroneous interpretation of the record and is contrary to the decision of the Eighth Circuit in *Denver City Tramway Company* v. *Norton,* 141 Fed. 599, as well as local (Illinois) decisions.

ARGUMENT.

We respectfully submit that the clear purpose of Rule 51 of Federal Rules of Civil Procedure is to govern the action of the judges of the Federal courts as well as counsel in the conduct of jury trials. Furthermore, that the language of this rule is clear and unambiguous in stating that the court shall inform counsel of its proposed action upon requested instructions prior to their arguments to the jury.* (*Dallas Railway* v. *Sullivan*, 108 Fed. (2) 581, (C.C.A. 5); *Terminal R. Ass'n of St. Louis* v. *Staengel*, 122 F. (2) 271 (C.C.A. Mo.); *Hughes, Federal Practice and Procedure*, Vol. 18, page 338, Sec. 24473).

Petitioner contends that the trial court clearly violated the spirit, purpose and plain language of Rule 51. Before the commencement of argument, defendant's counsel requested the court to inform him of the substance of the charge to be given to the jury by the court, and the ruling of the court upon the requested instructions filed prior

* Rule 51. Instructions to Jury: Objection. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

to that time (Tr. 159, 160). Upon this question the following proceedings were had:

"Mr. Vogel: There were four motions, I think it was, I filed last night. I should like to be advised by the Court the substance of the charge to the Jury before argument.

The Court: The substance of the charge to the Jury before argument?

Mr. Vogel: Yes.

The Court: I can't advise you right now. I can advise you generally as to the charge to the Jury. My secretary is typing it at the present moment. What do you want to know? They are the usual instructions in a personal injury case.

Mr. Vogel: No. I should like to be advised if the Court please, of the instructions and the substance of the instructions which the Court will give to the Jury in advance of argument. Otherwise it would be impossible intelligently to discuss those questions.

The Court: You know what the usual instructions are in a personal injury case. You have tried lots of them.

Mr. Vogel: Yes.

The Court: Nothing unusual about this case that requires anything different from the ordinary instructions as to due care and negligence and want of due care and damages, and so forth. Have you any particular point in mind in making your request?

Mr. Vogel: Counsel has submitted to the Court a number of requests, on both sides; I do not know which of those requests, if any, the Court will adopt in the charge.

The Court: I am adopting most of them, in substance, I am not giving any instructions that are argumentative.

Mr. Vogel: Surely.

The Court: I will try to explain to the Jury the questions of due care and negligence, and what is

due care and what is negligence, and the rights of persons on the street as recognized by the cases, and the usual instruction as to damages.

Mr. Steinberg: And the duty to keep a reasonable lookout. Will that be given?

The Court: That will come under the question of due care, I suppose, and negligence. As I say, my secretary is typing the instructions right now. If you have anything in particular now—

Mr. Vogel: All I have in mind is that I don't know specifically how the Court is going to instruct the Jury.

The Court: I can't tell you any more than that it will be usual instructions in personal injury cases, of accidents happening on the public highways; the usual instructions as to damages. Anything else, Mr. Vogel?"

The Circuit Court of Appeals in affirming this action of the trial court held that counsel had not sufficiently objected to the refusal of the trial court to inform him of the substance of the charge (Tr. 259). We submit that the above quoted colloquy established a sufficient objection in the record. The inference from the holding of the Circuit Court of Appeals, which is strengthened by questions to this petitioner from the bench during oral argument before the Circuit Court, is that to sufficiently record an objection at this time counsel should have refused to proceed with the trial. We cannot acquiesce to such a novelty in the practice.

Our second assignment of error under Rule 51 was not passed on by the Circuit Court of Appeals. It concerns the last sentence of Rule 51 providing that:

> "Opportunity shall be given to make the objection out of the hearing of the jury."

In the face of this language, the following transpired in the presence and hearing of the jury:

"The Court: Get the exhibits together, will you please?

Mr. Vogel. If the Court please, before the Jury leaves the bar, I should like to make my record on the charge.

The Court: Is there any objection?

Just a minute. Wait until the—

Mr. Vogel: I should like to make the record under Rule 51, if the Court please.

The Court: Yes. You have to do that.

Mr. Vogel: No. 1, I object to being required to make the objection in the presence of the jury.

The Court: Very well. We will proceed in chambers" (Tr. 200).

Thus, at the insistence of the court, in the presence of the jury, defendant's counsel clearly was shown to be objecting to the statements of the court to the jury upon the law. The point was preserved by the defendant as shown by the following proceedings had in chambers immediately following the foregoing:

Mr. Vogel: I think I was prejudiced by being required to request the opportunity to make the objection to the charge in chambers. As I understand Rule 51, it requires the court to furnish an opportunity to make the record out of the presence of the jury as a mandatory matter.

The Court: You made no objection in the presence of the jury yet.

Mr. Vogel: That is correct. But the clear inference is I was the fellow making the exceptions and objections. I should like to object to the charge—

The Court: Let the record show we retired immediately to chambers at Mr. Vogel's suggestion, and not a suggestion that the jury could hear, in regard to any objection that I know of" (Tr. 201.)

Petitioner has been unable to find any decisions on this point. To ascertain the correct meaning of this

portion of Rule 51, we have followed the decision of this court in *Mississippi Publishing Corp.* v. *Murphree,* 326 U. S. 438, 444, 90 Law Ed. 207, and have turned to the construction placed on the rules by the Committee.

The Honorable William D. Mitchell, Chairman of the Supreme Court Advisory Committee, in the Report of Federal Rules and Civil Procedure and Proceedings of the American Bar Association Institute, (1938) at page 316, said:

> "It is a bit uncomfortable for lawyers after the court has charged the jury, to have to get up in the presence of the jury and suggest that if the judge's charge is right, the verdict must be for the other side."

Turning to the text writers and authorities we find the following language in Cyclopedia of Federal Procedure, 2nd Ed. Vol. 7, Sec. 3394, at page 657:

> "In compliance with the provisions of Rule 51, requiring that 'opportunity shall be given to make the objection out of the hearing of the jury', will necessarily involve some little inconvenience, but it would seem so evident that one of the purposes of this requirement is to prevent possible improper remarks tending toward a miscarriage of justice from being made in the presence of the jury, and that the accomplishment of that salutory purpose would afford ample compensation for the additional burden imposed."

Perhaps the purpose of the rule can not better be stated than by the Honorable Armisted M. Dobie, Circuit Judge for the Fourth Circuit, in 25 Virginia Law Review at 261, where he said:

> " * * * but it seemed wiser to the committee that the last words heard by the jurors should be the impartial charge of the judge rather than the impassioned pleas of the counsel."

We submit that the action of the trial court was not only a clear misconception and misapplication of the last sentence in Rule 51 of the Federal Rules of Civil Procedure, but that such action clearly violated the spirit and purpose of the rule and was extremely prejudiced.

As the contributory negligence of the plaintiff was a vital issue on the trial of this cause, the plaintiff's knowledge as to the backing operation of the truck and the plaintiff's position at the time he was struck by the truck were material facts during the trial. The holding of the Circuit Court of Appeals that no conflict existed in testimony on these material facts, is not a correct interpretation of the record. On the question as to any warning the plaintiff had concerning the backing operation of the truck, a severe conflict existed. Plaintiff said he had no warning (Tr. 46, 53). Two witnesses for the defendant testified that the plaintiff was expressly warned that the truck was about to back up: Police Officer Hansen (Tr. 116, 120); Defendant's witness Welch (Tr. 139). As to the position of the plaintiff at the time of the accident, the plaintiff testified that he was standing upright and had started to walk away from his papers (Tr. 46 and 47). Two eye-witnesses for the defendant testified to the contrary. Police Officer Hansen testified that the plaintiff was down kneeling over his papers when struck by the vehicle (Tr. 117); Eye-witness Hornburg also testified that he was stooped over his papers (Tr. 97).

That the Circuit Court of Appeals misconstrued the state of the record is obvious from that court's decision. The court held:

> "No such sharp conflict exists here. *The stories of the witnesses were not in serious conflict as to what happened; the only eye-witness to the scene was produced by the plaintiff, and his story corroborated the plaintiff's and was not contradicted.*" (Italics added.) (Tr. 260).

With this conflict on material facts in the record, the Circuit Court of Appeals was bound to follow the Illinois law applicable to such a state of facts. *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64; *Texas & Pacific Railway Company* v. *Cox,* 145 U. S. 593, 605; *Swett* v. *Givner,* 5 Fed. Supp. 739, 140; 28 U.S.C.A., Sec. 725.

Under the law of Illinois refusal to give such an instruction when a serious conflict exists in the testimony as to essential facts, is reversible error. *West Chicago City Railroad Company* v. *Dougherty,* 170 Ill. 379; C. *& E. I. R. R. Co.* v. *Burridge,* 211 Ill. 9.

Furthermore, the decision of the Circuit Court of Appeals on this point is in conflict with the decisions of other Circuit Courts of Appeal. *Denver City Tramway Company* v. *Norton,* 141 Fed. (2d) 329; *John L. Roper Lumber Company* v. *U. S.,* 150 Fed. (2d) 329.

By an erroneous conception of the record the Circuit Court of Appeals relied upon the case of *Korn* v. *Chicago Railways Company,* 271 Ill. 329; 111 N. E. 85, as applicable. As a serious conflict in the testimony did exist here, we respectfully contend that the case of *Korn* v. *Chicago Railways Company,* is not applicable.

Entirely apart from the matters of law involved, this petitioner is being made to pay very large damages for an accident not rightly attributable to any fault on the part of this petitioner.

We respectfully submit to this court, that justice has not been accomplished in the trial of this case and that for the errors above pointed out, a fair trial has not been accorded this petitioner. We are fully cognizant of the limitations upon the time and energy of this court, but we urge that by allowing certiorari not only to settle the legal questions herein involved, but also to determine heretofore undecided questions involving the practice under Rule 51 of the Federal Rules of Civil Procedure, this court will be providing a deserved opportunity for justice between the parties as well as furnishing the Bar the correct meaning of Rule 51.

Respectfully submitted,

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